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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF TENNESSEE,

Petitioner,

vs.

DONALD RAY MIDDLEBROOKS,

Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Can a state constitutionally make felony murder a capital offense without other aggravating circumstances?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves an attack on a punishment with deep roots in American law: capital punishment in a case of felony murder where the state is unable to establish premeditation beyond a reasonable doubt. Such a radical change in the law would cause a vast disruption in the administration of criminal justice.

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1. Both parties have consented in writing to the filing of this brief.

More importantly, such a rule would seriously weaken the deterrent effect of capital punishment in those cases where it is most needed. It would remove a major incentive for felons not to kill their victims. The result is contrary to the rights of victims which *amicus* CJLF was formed to protect. *Amicus* therefore has an interest in this case.

SUMMARY OF FACTS AND CASE

The facts are stated in the opinion of the Tennessee Supreme Court, *State* v. *Middlebrooks*, 840 S. W. 2d 317 (1992). Kerrick Majors, 14 years old, and four friends were looking at items offered in a "flea market" by defendant Donald Middlebrooks, his wife Tammy, and their 16-year-old companion, Roger Brewington. Tammy yelled at them "Hey, leave our stuff alone." The boys ran, and defendant and Brewington caught Kerrick. When Kerrick protested, Brewington said, "Shut up, you nigger." *Id.*, at 323-324.

According to Middlebrooks' statement, Brewington suggested they "have some fun" with Kerrick. The trio's idea of "fun" was torture. Together, they slapped Kerrick, beat him with brass knuckles, hit him with a stick, urinated in his mouth, burned him with a cigarette lighter, hit him on the testicles, threatened him with castration, sodomized him with a stick, and stabbed him to death. The ordeal lasted three and a half hours. *Id.*, at 324-325.

Middlebrooks claimed that Brewington was the dominant actor. Neither Brewington nor Tammy testified. Even by Middlebrooks' own statement, however, he willingly participated in the torture and inflicted the final, fatal wound "to prove to Roger that I guess I was cooler." *Id.*, at 324.

The jury convicted Middlebrooks of first-degree murder in the perpetration of a felony and aggravated kidnapping, but returned verdicts of not guilty of premedi-

tated murder, armed robbery, and aggravated sexual battery. *Id.*, at 325. In the penalty phase, the prosecution introduced Middlebrooks' written "Justifiable Death Plan" to torture and kill law enforcement officers in revenge for their perceived "offenses" against him. *Ibid.*

The jury found two statutory aggravating circumstances: "(1) that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind . . ., and that (2) the murder was committed while the defendant was engaged in committing a felony." *Id.*, at 325-326. The jury found that the aggravating circumstances outweighed the mitigating and accordingly sentenced Middlebrooks to death. *Id.*, at 326.

The Tennessee Supreme Court reversed. It found that the felony-murder aggravating circumstance "does not narrow the class of death eligible murderers sufficiently under the Eighth Amendment to the U. S. Constitution, and Article I, § 16 of the Tennessee Constitution[2] because it duplicates an element of the offense" of felony murder. *Id.*, at 346.

SUMMARY OF ARGUMENT

"Duplication" of an element is a bogus issue. Whether a statutory system does or does not "narrow" depends on whether it numerically reduces the death-eligible class to a number substantially less than the class of all murderers. When there are several different types of murder, selection of one of them as "death-eligible" does narrow the class.

Felony murder, by itself, is both mathematically and morally valid as a "narrowing" circumstance. Felony murder is substantially less common than heat-of-argu-

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2. The parties dispute whether the decision rests on independent state grounds. *Amicus* will not brief that issue, because we do not believe additional argument on the point will be helpful to the Court.

ment murder. It is a kind of murder for which the deterrent effect of capital punishment is particularly needed. It causes more fear and more damage to society than the typical murder.

ARGUMENT

I. The critical question is whether the death-eligible class has been narrowed, not whether an element is "duplicated."

The state court in this case initially identified the question as whether the statute "sufficiently narrow[s] the population of death-eligible defendants under the Eighth Amendment . . . ." *State* v. *Middlebrooks*, 840 S. W. 2d 317, 341 (Tenn. 1992). Having thus correctly identified the question, however, the court was immediately sidetracked by the bogus issue of "duplication." *Ibid.* It makes no difference whatever, *amicus* submits, that the same fact that makes a killing murder also makes it death-eligible murder, so long as the death-eligible class is smaller than the class of murderers generally and so long as the separation is made on a basis which is both rational and not forbidden by the Constitution.

The evil exposed in *Furman* v. *Georgia*, 408 U. S. 238 (1972) was the result of two concurrent causes: the breadth of offenses for which death was an available punishment and the lack of guidance for selecting those actually sentenced to death from the eligible offenders.

> "[T]he risk of arbitrariness condemned in *Furman* is a function of the size of the class of convicted persons who are eligible for the death penalty. When the *Furman* case was decided, Georgia included virtually all defendants convicted of forcible rape, armed robbery, kidnaping and . . . murder in that class."

Walton v. *Arizona*, 497 U. S. 639, 715 (1990) (Stevens, J., dissenting).[3]

To address this problem, the post-*Furman* statutes all have some form of "narrowing" for the crime of murder, and this Court has several times referred to narrowing as a constitutional requirement. See *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983); *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988).

For a proper description of the "narrowing" function, we turn once again to the Georgia Supreme Court's classic answer to the certified question in *Zant*, *supra*, 462 U. S., at 870-872. The Georgia court used a metaphor of a pyramid, separated into levels by various planes. The severity of the punishment increased at each level.

The first plane separated murders from manslaughters and noncriminal homicides. *Id.*, at 871. This is an ancient division, going back to Henry VIII. See *post*, at 9.

The second plane, and the critical one for the present discussion, separates death-eligible murderers from those who may be sentenced only to prison. Georgia achieves this division through "aggravating circumstances." *Ibid.* Georgia does not divide murder into degrees. Ga. Code Ann. § 16-5-1. In Texas, the same division is accomplished by the definition of capital murder. See *Jurek* v. *Texas*, 428 U. S. 262, 270 (1976). The final plane, not at issue here, separates death-eligible defendants sentenced to death from those sentenced to life in prison. *Zant*, *supra*, 462 U. S., at 871.

It is worth noting at this point that many states insert an extra plane of division, although it is not constitutionally required. Many states both separate murder into

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3. Justice Stevens actually understated this point by including the qualifier "first-degree." *Ibid.* Georgia does not divide murder into degrees, and Furman was simply convicted of murder. *Furman*, *supra*, 428 U. S., at 239.

degrees *and* require an "aggravating" or "special" circumstance for death eligibility. See, *e.g.*, Tenn. Code Ann. §§ 39-13-202, 39-13-204(i); Cal. Penal Code §§ 189, 190.2; *Lowenfield*, *supra*, 484 U. S., at 246. *Lowenfield* established that insertion of this additional plane does not draw additional constitutional scrutiny. *Ibid*. Nor should it. The additional plane of division is to the benefit of defendants, further narrowing the eligible class. For such a salutary requirement to draw additional scrutiny would make no sense.

For the pyramid to perform as it should, the plane or planes need to provide a meaningful separation. That is, a substantial number of murderers need to be held in the lower, death-ineligible level or levels. A circumstance which is so vague that it could be applied to all murders fails to perform this function, and hence is invalid. *Godfrey* v. *Georgia*, 446 U. S. 420, 428-429 (1980) (plurality); *Zant*, *supra*, 462 U. S., at 878.

A circumstance which necessarily applies to all murders (*e.g.*, the death of victim) would similarly fail to provide a meaningful division, or indeed any division at all. The problem is not "duplication" of an element *as such*, but rather the *result* of that duplication, shrinking the set of death-ineligible murderers to the empty set. To use the *Zant* pyramid metaphor, the two planes are drawn in the same place, with no level between them.

Duplication of an element does not inherently result in collapsing the levels of the pyramid when the element is only one of several alternatives. In that case, the same factor can move the case two levels up in the pyramid while still providing a meaningful separation. To illustrate, let us consider five hypothetical Tennessee homicide cases: A, B, C, D, and E:[4]

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4. For convenience, we refer to the present Tennessee statutes rather than those in effect at the time of the crime. The state court did not regard the changes as important to its analysis. See 840 S. W. 2d, at 345.

- A's killing occurred suddenly in the heat of an argument, "in a state of passion produced by adequate provocation. . . ." This is manslaughter. Tenn. Code Ann. § 39-13-211(a).
- B's killing also occurred suddenly in the heat of an argument. It is found to be unlawful and intentional, and not on adequate provocation, but not premeditated and not in the course of another felony. Thus, it is second-degree murder. See *id.*, § 39-13-210(a).
- In C's case, another argument murder, the evidence showed multiple shots in the victim's skull, fired from behind. This is sufficient to establish "premeditation." See *id.*, § 39-13-202(a)(1); *State* v. *Caldwell*, 671 S. W. 2d 459, 463 (Tenn. 1984). This is first-degree murder, but there are no statutory aggravating circumstances. See Tenn. Code Ann. § 39-13-204(i). Hence, the offense is not death-eligible.
- D robbed a convenience store. The store clerk was found dead with a bullet in his head. D is proved to have gone armed to the store with the intent to rob it, and forensic evidence establishes that he was the shooter. The exact circumstances of the shooting cannot be established, because there are no living witnesses other than D. The jury is able to find recklessness from D's proven conduct. This is felony murder and hence first degree. Tenn. Code Ann. § 39-13-202(a)(2). An aggravating circumstance is also true. *Id.*, § 39-13-204(i)(7).
- E, an adult, murders a child under 12 intentionally, willfully, deliberately, and with premeditation. This is first-degree murder with an aggravating circumstance. *Id.*, § 39-13-204(i)(1).

The Tennessee statutory system definitely does provide a separation. D and E may be sentenced to death, if the jury so decides, while A, B, and C may not, regardless of how the jury feels about them or their conduct. That separation is made on the basis of objective criteria and

not on the jury's unguided placement of the crime on an unmarked continuum. Cf. *Maynard* v. *Cartwright*, 486 U. S. 356, 364 (1988).

People may legitimately differ as to whether D's conduct really *should* be considered more severely punishable than C's. The Tennessee Supreme Court was evidently troubled by a legislative value judgment which conflicts with its own opinion as to relative blameworthiness. See *State* v. *Middlebrooks*, *supra*, 840 S. W. 2d, at 345. This value disagreement, however, has nothing to do with the question of whether the statute "narrows." The statute *does* narrow the death-eligible class, because it excludes from the death penalty all second-degree murderers and all those who commit premeditated murder under none of the circumstances listed in the statute. See Tenn. Code Ann. § 39-13-204(i)(1)-(12). The "size of the class of convicted persons who are eligible for the death penalty," *Walton*, *supra*, 497 U. S., at 715 (Stevens, J., dissenting), is reduced. The fact that the subclass of murderers convicted under the felony-murder rule is not *separately* narrowed is simply irrelevant.

Given that the statute does narrow, the remaining question is whether it *adequately* narrows to meet the requirements of *Furman*. *Amicus* believes it does, for the reasons stated in the next part.

II. The felony-murder circumstance adequately narrows the eligible class.

Felony murder, by itself, is a valid "narrowing" circumstance, both morally and mathematically. It is morally valid because it is related to culpability in a way rational people may believe to be appropriate. It is mathematically valid because it significantly reduces the death-eligible class.

A. History of "Narrowing."

The notion of narrowing the application of capital punishment, in terms of both the offense and the offender, has a long history. The first distinction was the "benefit of clergy." Originally this was an exemption from secular punishment for true clergymen, but by Blackstone's time the benefit had become an exemption from capital punishment for all first offenders. See 4 W. Blackstone, Commentaries *367 (1769).

At the same time the benefit was being extended to more offenders, it was being restricted to fewer offenses. By statute in the reign of Henry VIII, the benefit was withdrawn from murder with "malice prepense." 23 Hen. 8, ch. 1, §§ 3, 4 (1531); 1 Edw. 6, ch. 12, § 10 (1547); see *Tison* v. *Arizona*, 481 U. S. 137, 156 (1987). Thus began the distinction between murder and manslaughter.

As time went on, a variety of other circumstances came to be classified as murder, even though they did not meet the literal requirement of "malice aforethought." These included killing in the heat of passion upon a provocation deemed inadequate, killing in the course of a felony (felony murder), and killing by extremely negligent conduct ("depraved heart"). 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.1, at 182-183 (1986). All of these killings were thus felony without benefit of clergy (*i.e.*, capital offenses) in England and, initially, in America.

In 1794, Pennsylvania legislatively divided murder into degrees. 1794 Pa. Laws ch. 1777. This reform was widely copied. *McGautha* v. *California*, 402 U. S. 183, 198 (1971). The purpose of the division was, once again, to

separate capital from noncapital murder.[5] Yet statutory narrowing proved insufficient, and jury discretion was added to replace rampant jury nullification. "Except for four States that entirely abolished capital punishment . . ., every American jurisdiction has at some time authorized jury sentencing in capital cases." *Id.*, at 200, n. 11.

Then came the case of *Furman* v. *Georgia*, 408 U. S. 238 (1972). Two of the defendants in that case had been convicted of rape, and the third was convicted of murder in a state which did not divide murder into degrees. *Id.*, at 239. Thus the adequacy of narrowing by the conventional definition of first-degree murder was not presented in *Furman*. Even so, it was widely believed after *Furman* that further narrowing was necessary. Every discretionary sentencing system reviewed by this Court since *Furman* has either defined its highest degree of murder more narrowly than the traditional "first degree" or has required an additional "aggravating" or "special" circumstance. See *Jurek* v. *Texas*, 428 U. S. 262, 270 (1976) (discussing two techniques of narrowing).[6]

B. Blood Temperature.

One consistent theme throughout the history of narrowing has been the distinction between the "hot-blooded" and "cold-blooded" killings. Though physiologically inaccurate, these terms have been understood by common folk, both ancient and modern, as a valid distinction between types of killings. See 1 W. Hawkins,

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5. For example, as originally enacted in 1872, California Penal Code section 190 provided: "*Every* person guilty of murder in the first degree shall suffer death, and *every* person guilty of murder in the second degree is punishable by imprisonment in the State Prison not less than ten years." (Emphasis added).

6. The only state in the 1976 cases not to "narrow" beyond the traditional degrees was North Carolina. The statute there was struck down because it was mandatory, not because the death-eligible class was too broad. *Woodson* v. *North Carolina*, 428 U. S. 280, 286, 305 (1976).

Pleas of the Crown, ch. 31, §§ 21, 29, at 80, 82 (1724); *United States* v. *Frady*, 456 U. S. 152, 170, n. 18 (1982). The distinction, and the difficulties with it, shed light on the need for the felony-murder rule.

The quintessential manslaughter is the killing "upon a sudden quarrel." See Cal. Penal Code § 192(a); 1 Hawkins, *supra*, ch. 30, § 1, at 76. With no prior design to commit any crime, two people get in a fight, the fight escalates to deadly force, and one of them is dead. This is the scenario that is uniformly considered to be a less culpable offense.

Yet the distinction between hot- and cold-blooded killings did not remain, by itself, the distinction between murder and manslaughter. Some people are excessively prone to fighting and react with extreme violence to insignificant or imagined slights. For such cases, manslaughter is too lenient a verdict. Thus, the law of manslaughter developed the requirement of "reasonable provocation," with a complicated body of law on what is "reasonable." See 2 LaFave & Scott, *supra*, § 7.10(b), at 255-264; 1 Hawkins, *supra*, ch. 31, § 33, at 82.

The division of murder into degrees was largely an effort to once again distinguish those cases that would have been manslaughter under a narrow interpretation of the malice requirement. The similarity of the modern statutory term "premeditation" to the old "malice prepense" is not an accident. See 2 LaFave & Scott, *supra*, § 7.1(a), at 182, n. 4.

However, the concept of "premeditation" soon suffered a dilution similar to the one which happened with "malice."[7] No particular amount of time is required, and the premeditation may last only a few seconds. *Id.*, § 7.7(a), at 237. Many commentators doubt whether the premeditation requirement, so diluted, provides any

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7. Statutes typically require that the killing be "willful" and "deliberate" as well, which adds little or nothing.

meaningful separation. Justice Cardozo considered the distinction incomprehensible to juries. B. Cardozo, Law and Literature and Other Essays 99-100 (1931). This Court has called the concept "amorphous." *Woodson*, *supra*, 428 U. S., at 290-291. The Model Penal Code abandons the concept of premeditation. American Law Institute, Model Penal Code and Commentaries, part II, vol. 1, § 210.2, at 20 (1980).

The result of this double dilution is that killing upon a sudden quarrel can span three degrees of crime, depending on the jury's view of the reasonableness of the provocation and the inner workings of the defendant's mind. This is a considerable problem, because arguments are far and away the predominant contributing circumstance of willful homicides. One study found that of all willful homicides with a known contributing circumstance, nearly half resulted from arguments. California Dept. of Justice, Homicide in California 1988, at 26. That is nearly triple the proportion of the second most common circumstance, felony murder. *Ibid.*

The post-*Furman* statutes have attempted to further narrow the death-eligible class. The aggravating circumstances and definitions of capital murder vary widely from state to state. If we read between the lines of the aggravating circumstances to see what is *not* capital murder, however, we find some consistency. Two kinds of murder are generally excluded from capital punishment, provided the defendant has committed no other murder, either concurrently or previously. First, there is the defendant who kills suddenly in a moment of anger. The second kind excluded is the "depraved heart" murder, where the defendant intends no felony at all, but acts with gross indifference to human life. See generally 2 LaFave & Scott, *supra*, § 7.4, at 199-206.

Godfrey v. *Georgia*, 446 U. S. 420 (1980) illustrates the problems that arise when a statute fails to exclude the simple heat-of-anger killing. Godfrey shot his estranged

wife and her mother immediately after a heated argument over the terms of divorce. *Id.*, at 425. Georgia's "outrageously or wantonly vile" aggravating circumstance failed to distinguish the case in a principled way from noncapital cases. *Id.*, at 432-433.[8]

States which have preserved similar aggravating circumstances have done so only by narrowing the circumstance to exclude the simple killing in anger. Florida, at least initially, required an additional element that the crime be "unnecessarily torturous." See *Proffitt* v. *Florida*, 428 U. S. 242, 255 (1976). Arizona required that the killer relish the killing, an emotional state quite different from the hot temper of *Godfrey*. See *Lewis* v. *Jeffers*, 497 U. S. 764, 777, 783 (1990). Idaho required a finding that the killer was "cold-blooded" and "pitiless," which meant a killing without emotion. *Arave* v. *Creech*, 123 L. Ed. 2d 188, 199, 113 S. Ct. 1534, 1541 (1993).[9]

C. Felony Murder.

Murder with the specific intent to kill is the most common species of murder, but it is not the only one. The other type which is commonly involved in capital cases is felony murder.[10]

Probably no other aspect of American law has such universal legislative acceptance in the face of such a

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8. On the facts of the case, multiple murder was a clear, simple, and thoroughly rational ground of distinction, but Georgia had no such statutory circumstance. See *id.*, at 432-433, n. 15; cf. *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988) (multiple victims constitutes valid narrowing circumstance).

9. It is worth noting that these latter two statutes, which come closest to the constitutional line, also come closest to including simple heat-of-anger murder.

10. Other types include intent to do serious bodily harm and "depraved heart" murder, see 2 LaFave & Scott, *supra*, §§ 7.3-7.4, at 197-206, but these are rarely capital cases.

deluge of academic criticism as the felony-murder rule. The rule is the law in all but three American jurisdictions. 2 LaFave & Scott, *supra*, § 7.5, at 233. Yet the commentary is almost uniformly hostile. See *Middlebrooks*, *supra*, 840 S. W. 2d, at 337 (citing critical articles). Where such a difference occurs, it is likely that the academics have lost touch with an important "real world" fact. So it is with felony murder. Academic critics tend to make several errors. First, they ignore the limits of factual knowledge. Second, they look at crime from the standpoint of what to do with the prisoner before the court, without considering the impact on future victims. Third, they fail to consider the broader impact of crime on society.

1. The limitations of knowledge.

Intent to kill is not an element of felony murder. Many theoreticians therefore approach the topic as if accidental killings were the norm in this area. Professor LaFave, after citing figures on the statistical occurrence of homicide during felonies, makes this remarkable statement: "These statistics, of course, do not even reflect how many of the homicides were committed purposely, knowingly or recklessly (*which would clearly be subject to prosecution without the felony-murder rule*) and how many were negligent or accidental." 2 LaFave & Scott, *supra*, § 7.5(h), at 232, n. 131 (emphasis added).

Professor LaFave is dead wrong. A killing during a robbery is not "clearly . . . subject to prosecution" as intent-to-kill murder merely because it *was*, *in fact*, intentional, or even premeditated. It is only subject to such prosecution if the state has *evidence* establishing beyond a reasonable doubt that the killing was intentional.

We often do not know the precise circumstances of the killing, because the defendant has killed the only honest witness. In cases with multiple defendants, we

may have the testimony of an accomplice, but the problems with such testimony are well known.

In the present case, neither of the accomplices testified. The only version we have of the event is defendant's statement. He claims that he, a grown man, was a passive participant, while the dominant figure in the crime was a 16-year-old boy. Lacking any testimony to the contrary, the jury did not find premeditation proved beyond a reasonable doubt. *Middlebrooks*, *supra*, 810 S. W. 2d, at 324-235.

Where lack of evidence makes the difference between guilt and innocence, our tradition demands adherence to the maxim that it is better to let ten guilty people go free than to convict one innocent person. See 4 W. Blackstone, Commentaries *358 (1769). In felony murder, however, the difference lies not between innocence and guilt but between one proven and highly culpable[11] *mens rea* (intent to commit a dangerous felony) and another highly likely but often unprovable *mens rea* (intent to kill).[12] The felony-murder rule is society's judgment that a conviction for murder in those rare cases of truly accidental death during a felony is not so harsh as to justify the rampant injustice of rewarding intentional felony-murderers for exterminating the witness. Accident is, of course, a proper mitigating circumstance to consider in proceedings for sentencing, parole, or clemency, and it

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11. Professor Rosen's assertion that a conviction of felony murder does not constitute *any* culpability finding, Rosen, Felony Murder and the Eighth Amendment Jurisprudence of Death, 31 B.C.L. Rev. 1103, 1127 (1990), is patently absurd.

12. Even Professor Rosen admits that "few" felony-murder defendants do not intend to kill. *Id.*, at 1131. Lack of intent is more common in "nontriggermen," of course. *Amicus* will not brief that aspect of the felony-murder problem, because it is not presented by the facts of this case and because it has been thoroughly covered in other decisions of this Court. See *post*, at 23.

is a constitutionally required consideration in capital cases. See *Tison* v. *Arizona*, 481 U. S. 137, 156 (1987).

The Model Penal Code implicitly recognizes the evidentiary basis of the felony-murder rule. The Code would abolish felony murder as a separate category. Instead, the prosecution would charge reckless murder, and the commission during a felony would raise a rebuttable presumption of recklessness. "The effect of the Model Code, therefore, is to abandon felony murder as a separate basis for establishing liability for homicide and to retain the presumption described above as a concession to the facilitation of proof." Model Penal Code and Commentaries, *supra*, § 210.2, at 30. This salutary reform would go a long way toward answering the objections to the felony-murder rule while retaining its utility. Regrettably, it is now precluded by *Sandstrom* v. *Montana*, 442 U. S. 510 (1979) and its progeny. See *Yates* v. *Evatt*, 114 L. Ed. 2d 432, 447-448, 111 S. Ct. 1884, 1891-1892 (1991) (cannot presume malice from use of deadly weapon).

Faced with a choice between shouldering the full burden of proof of the element of intent to kill and eliminating or reducing that element, legislatures have overwhelmingly chosen the latter. For a more complete understanding of why, *amicus* asks the Court to consider the plight of the felony victim.

2. The victim as witness.

We tend to think of sentencing in the courtroom context. The defendant stands in court in jail garb. He is heavily guarded and possibly shackled. He presents little or no immediate danger, as lawyers debate what should be done with him.

Amicus asks the Members of this honorable Court to consider for a moment a different picture. See felony-murder defendants as the victims see them. Think of John and Donnelda Lyons in the Arizona desert, begging for their lives while the Tison gang decides what to do

with them and their family. See *Tison* v. *Arizona*, 481 U. S. 137, 137-141 (1987). Think of Jack Huddleston lying on the floor in the convenience store cooler in Snyder, Texas while Dorsie Johnson holds a gun to the back of his head. *Johnson* v. *State*, 773 S. W. 2d 322, 324 (Tex. Crim. App. 1989), *pending sub nom.*, *Johnson* v. *Texas*, No. 92-5653. Think of Dickie Gibson, begging for his life in the orange grove in Riverside, California while Richard Boyde orders him to kneel. See *Boyde* v. *California*, 494 U. S. 370, 372-374 (1990). Think of Pamela Lane and what was going through her mind as Horace Butler raped her at gunpoint. See *Butler* v. *McKellar*, 494 U. S. 407, 409-410 (1990).

What both the victim and the felon understand in this interval is that the felon has a powerful incentive to kill the victim. Robbery, rape, and kidnapping are serious offenses and severely punished. The felon can substantially reduce his chance of capture by eliminating the witness. What the victim needs at this point is a powerful incentive for the felon *not* to kill him or her.

Capital punishment for felony murder is such an incentive. To be sure, it is not perfect. Substantial numbers of felons will decide that reducing the risk of capture is worth incurring the risk of execution. Others might be deterred by life in prison.

Yet it would defy reason to assume that of all the rapes and robberies and kidnappings committed in this country *no* perpetrator will *ever* be deterred from killing the victim by a substantial, credible threat of capital punishment. Common sense tells us the opposite. See *Gregg* v. *Georgia*, 428 U. S. 153, 186, n. 33 (1976).

The deterrent is weakened by a requirement that intent and premeditation be proved by the prosecution. In some cases, to be sure, such proof will be available from the manner of the killing, accomplice testimony, or a confession. In others, however, it will not. In killing

the victim, the defendant eliminates the proof of premeditation.

Once more, *amicus* asks, *see this crime through the victim's eyes*. Think of Kerrick Majors, 14 years old, kidnapped, bound, dragged to the woods, beaten with sticks and brass knuckles, burned with a lighter, threatened with castration, sodomized with a foreign object, and slashed with a knife. See *Middlebrooks*, *supra*, 840 S. W. 2d, at 324. Imagine his terror, not knowing what they will do next, but knowing they have a powerful reason to kill him.

Defining felony murder by itself as a capital offense is society's effort to tilt the balance *in favorem vitae* for the *victim* for once. Society certainly has a legitimate interest in giving the felon a powerful reason to keep the victim alive. This interest provides an eminently rational basis for including felony murder in the most severely punished class of crimes.

3. Public fear.

One of the relevant considerations in capital sentencing is the crime's "impact on the victim's family *and community*." *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 739, 111 S. Ct. 2597, 2611 (1991) (O'Connor, J., concurring) (emphasis added). *Payne* dealt with impact at the individual level, but the principle is equally valid at the categorical level. Felony murder is distinguishable from heat-of-argument murder because it has a greater and more detrimental impact on the community. Felony murder causes more fear.

As noted *ante*, at 12, killings arising from arguments are the most common type. Yet these are, by and large, not the cases that strike fear into the hearts of the people. "[T]hose [crimes] committed randomly, such as street muggings, caused greater anxiety than those in which the motivation was personal, such as the murder of a spouse."

Study Shows Public Frightened Most by Random, Local Crimes, 15 Crim. Just. Newsl. 4 (Oct. 1, 1984).

The difference is control over our lives, or at least the perception of control. See C. Silberman, Criminal Violence, Criminal Justice 16 (1978). Reading of a case such as *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) does not leave us with that sinking feeling that we may be next. Peaceful, law-abiding people can, to a large extent, avoid such crimes by avoiding violent people and by managing our disputes in such a way that tempers do not reach the boiling point.

Robbery is different. People are robbed simply because they possess some item the robber wants. Fear of this crime is greatly compounded by the fear of being injured or murdered by the robber. That fear is well founded. Thirty percent of robbery victims are injured, and about 2000 a year are murdered. Cook, Robbery Violence, 78 J. Crim. L. & Criminology 357, 357 (1987).

When people say they fear crime, felony murder is a very large component of that fear. The toll this fear takes on our quality of life is staggering. A third of all Americans limit the places or times we will go shopping. U. S. Bureau of Justice Statistics, Sourcebook of Criminal Statistics—1991, at 198 (1992). Three-fifths of the entire population limit the places we will go by ourselves. *Ibid.* About the same number are fearful of being attacked or robbed when out alone at night in our own neighborhoods. *Ibid.* More ominously, 18 percent of us have armed ourselves, *ibid.*, and a full third of Americans think vigilantism is sometimes justified. *Id.*, at 199.

Felony murder, as a category, inflicts a different and greater harm on society than does murder arising out of a personal argument. This greater harm is an indepen-

dent, thoroughly rational basis for making it a death-eligible category of murder.[13]

D. Statistical Prevalence.

The problem identified in *Furman* v. *Georgia*, 408 U. S. 238 (1972) was in part a numerical one. The number of people sentenced to death was only a tiny fraction of those eligible. See *ante*, at 4.

The largest step toward fixing this problem was simply eliminating capital punishment for all commonly occurring crimes other than murder. This was done by statute in most states after *Furman*, see *Coker* v. *Georgia*, 433 U. S. 584, 594 (1977), and *Coker* took care of the rest, *id.*, at 600.[14]

Gathering statistics for various types of murder is complicated by the variations in definitions among the states. The FBI's crime index, consequently, lumps all willful homicide together. See Sourcebook, *supra*, 742. For the purpose of this discussion, *amicus* has obtained data from California, which, as the largest state, provides the largest sample of cases from within a single jurisdiction. California has the traditional definition of first-degree murder. See Cal. Penal Code § 189. Felony

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13. In a society which remains largely segregated in social relationships, felony murder is more likely to involve a murderer and victim of different races than is murder arising from personal enmity. Rosen wrings his hands over this, Rosen, *supra*, 31 B.C.L. Rev., at 1117-1120, but it is not an equal protection issue so long as criminals *within* each category are treated equally. See Klein & Rolph, Relationship of Offender and Victim Race to Death Penalty Sentences in California, 32 Jurimetrics J. 33 (1991) (no measurable bias once other factors accounted for). Rosen's concerns appear to be based on the abhorrent notion that the numbers themselves are the goal, rather than equal treatment of similarly situated people.

14. Death penalty statutes for some exotic offenses remain on the books, see, *e.g.*, Cal. Penal Code § 37 (state treason), but these have no significant effect on the numerical problem, see *Woodson* v. *North Carolina*, 428 U. S. 280, 292, n. 25 (1976) (no convictions of these offenses).

murder is a capital offense without a finding of premeditation, Cal. Penal Code § 190.2(a)(17), although for a few years case law required a finding of intent to kill, even for the actual killer, see *Carlos* v. *Superior Court*, 35 Cal. 3d 131, 153-154, 672 P. 2d 862, 877 (1983), overruled by *People* v. *Anderson*, 43 Cal. 3d 1104, 1147, 742 P. 2d 1306, 1331 (1987).

The data, from California Offender-Based Transaction Statistics, are summarized in Appendix A. They show that the narrowing "pyramid" does, in fact, work the way it is described in *Zant* v. *Stephens*. See *ante*, at 5-6. Half of all criminal homicides result in convictions of manslaughter rather than murder.[15] Of those that remain, about half are first-degree and half are second-degree, so first-degree murders are about one-quarter of homicide convictions.

Statistics for convictions of murder with "special circumstances" are not available in this database, but even comparing actual death sentences to first-degree murder convictions, we see that 11.7 percent of all first-degree murderers are sentenced to death. That is more than one in nine, far above the "capriciously selected random handful" mentioned in *Furman*. Thus, the mere division of murder into degrees, without special or aggravating circumstances at all, is sufficient to bring the proportion above the "handful" level.[16]

The use of special circumstance findings further narrows the death-eligible category. This effect can be estimated by looking at the prison population. In the summer of 1990, there were 807 California prisoners sentenced to life without parole. Sourcebook, *supra*, at

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15. This is doubtless greater than the actual proportion of manslaughters, due to plea bargaining.

16. Although numerically adequate, the traditional definition of first-degree murder still suffers from the "amorphous" definition of premeditation. See *ante*, at 12.

652. We can safely assume that substantially all of them were death-eligible.[17] The population of death row in 1990 was between 253 and 280. U. S. Bureau of Justice Statistics, Capital Punishment 1990, at 6 (1991). Averaging the latter two numbers, it appears that there are about three life-without-parole prisoners per death row prisoner. Thus, approximately one-quarter of those who legally could have been sentenced to death actually were.

Thus, in a state which defines its death-eligible class as broadly as Tennessee, the numerical problem identified in *Furman* has been resolved. A sentence of death is a credible threat, being imposed in a very substantial fraction of the cases where it is legally possible.[18]

E. Valid Narrowing.

The task of deciding which categories of crime are most deserving of the most severe punishment is quintessentially a legislative function, and the judiciary is on thin ice whenever it intrudes into this area. See *Harmelin* v. *Michigan*, 115 L. Ed. 2d 836, 867, 111 S. Ct. 2680, 2703 (1991) (Kennedy, J., concurring in the judgment). There are, to be sure, some grounds for questioning legislative judgment, and more so in capital sentencing than in prison terms, see *ibid.*, but the primacy of the legislature in this area must always be kept in mind. See *Lewis* v. *Jeffers*, 497 U. S. 764, 796, n. 11 (1990) (Blackmun, J., dissenting).

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17. That is, we assume that few, if any, are convicted of kidnap for ransom, Cal. Penal Code § 209(a); train wrecking, *id.*, § 218; or murder of a transit worker, *id.*, § 190.25, under circumstances not also qualifying under section 190.2(a)(17) paragraphs (i), (ii), or (ix).

18. Actual execution of the sentence is a different matter, and one not within the state's power to correct. See, *e.g.*, *Gomez* v. *United States District Court*, 118 L. Ed. 2d 293, 112 S. Ct. 1652 (1992); *In re Blodgett*, 116 L. Ed. 2d 669, 112 S. Ct. 674 (1992); *Blodgett* v. *Campbell*, No. A-851 (U. S. May 17, 1993) (O'Connor, J., in chambers).

The most obvious limitation is the principle of equal protection. A statute which limited the death-eligible class on the basis of a "suspect" classification would clearly be invalid. *Furman* v. *Georgia*, 408 U. S. 238, 256 (1972) (opn. of Douglas, J.). No suspect classification is at work here. The distinction need only have a rational basis. *Dallas* v. *Stanglin*, 490 U. S. 19, 23 (1989).[19] Felony murderers are rationally distinguishable from other murderers, and there is a rational basis for believing that felony murder is a particularly aggravated form of murder. See *ante*, at 13-20. Indeed, the virtually unanimous judgment of those American legislatures which have divided murder into degrees, see 2 LaFave & Scott, *supra*, § 7.7, at 236, is enough by itself to compel this conclusion.

Public opinion is in accord. A national survey asked people to judge the severity of 204 crimes, including numerous types of homicide. Rape-murder was judged the second most severe of the entire group, and the single most severe crime against a lone victim. Only planting a bomb which kills 20 people was judged more serious. U. S. Bureau of Justice Statistics, The Severity of Crime 2 (1984).

A classification can also be attacked on the ground that capital punishment is disproportionate to the offense. For felony murder, this ground has been thoroughly plowed. See *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982) (disproportionate for minor accomplice with no intent to kill); *Tison* v. *Arizona*, 481 U. S. 137, 158 (1987) (not disproportionate for major participant with reckless indifference to life). Even accepting defendant's version of events for the sake of argument, the *Tison* standard is clearly met. Defendant is an actual killer who intended to kill, to prove he was "cooler." *Middlebrooks*, *supra*, 840 S. W. 2d, at 324.

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19. We trust no one will argue that there is a "fundamental right" to commit murder.

This leaves the *Furman* requirement. As expressed in *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983), "an aggravating circumstance must *genuinely narrow* the class of persons eligible for the death penalty and must *reasonably justify* the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (Emphasis added.) The second prong of this test adds little to the equal protection and proportionality issues discussed above. A reasonable justification for a greater penalty is not necessarily one that the judiciary agrees with. It is one that reasonable people might agree with.

Professor Rosen states flatly, "A simple felony murder, unaccompanied by any other aggravating factor, is not worse than a simple premeditated and deliberated murder." Rosen, Felony Murder and the Eighth Amendment Jurisprudence of Death, 31 B.C.L. Rev. 1103, 1129 (1990). That is nothing more than Richard Rosen's personal opinion, and many people disagree. Given the amorphous nature of the "premeditation" inquiry, see *ante*, at 12, people can and do reasonably believe that a person who rapes a woman and then kills her is more culpable than one who reflects a mere moment before killing in the course of a heated argument.

A plurality of this Court rejected a related "moral disparity" argument in *Schad* v. *Arizona*, 115 L. Ed. 2d 555, 573, 111 S. Ct. 2491, 2503-2504 (1991):

> "Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, *it is clear that such equivalence could reasonably be found*, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense." (Emphasis added, footnote omitted.)

The reasonableness of this position is similarly sufficient to rule out the moral disparity argument here. The judiciary's "agreement or disagreement has nothing to do

with the right of a majority to embody their opinions in law." *Lochner* v. *New York*, 198 U. S. 45, 75 (1905) (Holmes, J., dissenting). Nowhere in the Constitution is there a mandate to conform to the "better view" as pronounced from the ivory tower of the law reviews.

The only question, then, is whether the statute genuinely narrows. In the absence of a *Godfrey* vagueness issue, this is only a mathematical question. Does the statutory system as a whole reduce the death-eligible class to a meaningfully reduced subset of the entire class of murderers? The answer, *amicus* submits, is clearly yes.

The Tennessee system, taken as a whole, excludes simple cases of heat-of-argument killings. Such killings will generally not be first-degree murder unless they are found to be "intentional, premeditated and deliberate." Tenn. Code Ann. § 39-13-202(a)(1). Most of those which clear this hurdle will be excluded from the death penalty by the absence of any of the aggravating circumstances. See Tenn. Code Ann. § 39-13-204(i).

A very substantial portion of murderers are thus shielded from capital punishment. The data from California, which has a law of similar breadth, confirms that the numerical reduction is indeed meaningful. Felony murder, by itself, is a valid narrowing circumstance.

CONCLUSION

The judgment of the Supreme Court of Tennessee should be reversed.

May, 1993

Respectfully submitted,

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APPENDIX A

Year	First Degree Murder	Second Degree Murder	Voluntary Manslaughter	Involuntary Manslaughter	Total Homicide
1982	281	252	518	87	1138
1983	223	247	392	89	951
1984	230	212	406	93	941
1985	210	253	359	112	934
1986	254	248	444	122	1068
1987	261	240	417	110	1028
1988	245	265	380	100	990
1989	243	256	375	94	968
1990	232	279	346	78	935
1991	289	361	451	87	1188

Table 1. Convicted Offense for Persons Arrested in California and Convicted of Homicide

Data are from Offender-Based Transaction Statistics compiled by the California Bureau of Criminal Statistics. Data limitations and characteristics are described in California Dept. of Justice, Crime and Delinquency in California, 1991, at 171.

Year	Total Homicide	Murder		1st Deg. Murder		Death Sentences			
		Number	Percent of Total Homicide	Number	Percent of Total Homicide	Number	Percent of Total Homicide	Percent of Murders	Percent of Murder-1
1982	1138	533	46.8%	281	24.7%	38	3.3%	7.1%	13.5%
1983	951	470	49.4%	223	23.4%	34	3.6%	7.2%	15.2%
1984	941	442	47.0%	230	24.4%	27	2.9%	6.1%	11.7%
1985	934	463	49.6%	210	22.5%	16	1.7%	3.5%	7.6%
1986	1068	502	47.0%	254	23.8%	21	2.0%	4.2%	8.3%
1987	1028	501	48.7%	261	25.4%	25	2.4%	5.0%	9.6%
1988	990	510	51.5%	245	24.7%	34	3.4%	6.7%	13.9%
1989	968	499	51.5%	243	25.1%	33	3.4%	6.6%	13.6%
1990	935	511	54.7%	232	24.8%	33	3.5%	6.5%	14.2%
1991	1188	650	54.7%	289	24.3%	26	2.2%	4.0%	9.0%
Average			50.1%		24.3%		2.8%	5.7%	11.7%

Table 2. Percentages in Categories of Homicide.